IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of Case

Criminal Appeal No. 91 of 2004

Date of decision : 2nd September, 2004

For the approval of:

Hon'ble Chief Justice V.S. Sirpurkar.

Hon'ble Mr. Justice J.C.S. Rawat.

- Whether the order/judgment should be sent to the respondent for reporting? (Yes)

- Whether the reporters be allowed to see the judgment? (Yes)

LSR

IN THE HIGH COURT OF UTTARANCHAL

AT NAINITAL

CRIMINAL APPEAL NO. 91 OF 2003

Baboo Ram Jatav son of Sri Seeta Ram
R/o village Dhanori, Police station Swar
District Rampur ----------Appellant

Versus

State of Uttaranchal ----------Opposite Party

Mr.Tanvir Alam, learned counsel for the appellant
Mr.D.K.Sharma, learned Government Advocate for the State

Coram:- Hon'ble V.S.Sirpurkar, C.J.
Hon'ble J.C.S.Rawat, J.

(Per Hon'ble J.C.S.Rawat J)

1. This is a criminal appeal by the accused Baboo Ram Jatav against the judgment and order dated 21.1.2003 passed by Sri S.K. Raturi the then Sessions Judge, Udham Singh Nagar, by which the appellant has been convicted for an offence of murder and sentenced to undergo rigorous imprisonment for life on the allegation that on 16.3.2000 at about 7.40 p.m., he committed the murder of one Balwant Singh by causing injury by fire arm near Gaushala turn towards Partappur P.S.Kashipur district Udham Singh Nagar. The appellant has been acquitted by the trial court under section 25 Arms Act.

2. The prosecution story, in brief, is that S.I. D.K.Tiwari (P.W.1) was on patrol duty along with constables Gauri Shah and Pramod Kumar on 16.3.2000. When he reached Gaushala turn towards

Partappur about 150 yards at 7.40 p.m. he saw a person in the head light of his motorcycle lying in injured condition on the left side of the road from whose back the blood was oozing. On asking, he told his name Balwant Singh son of Seeta Ram resident of village Dhanori P.S.Swar, district Rampur. According to the deceased his SADU (brother-in-law) Kesar was resident of his village. Nardev accused, brother of Kesar, had illicit relations with his wife. Nardev has got his wife separated. Nardev accused had engaged the appellant Baboo Ram Jatav of his village for the murder of Balwant Singh. Due to the fear he left his village and was living in Gaushala village. On the date of occurrence, he was returned from the market of Partappur after purchasing the vegetables. After sometime, in the way, the appellant Baboo Ram Jatav met him. The deceased seeing Baboo Ram Jatav after taking turn back he fired on the back of the deceased. Seeing the serious condition of the deceased, he was sent to Government Hospital, Kashipur by Constables Gauri Shah and Pramod Kumar Singh through the truck and seeing the seriousness of the deceased, S.I. D.K.Tiwari (PW 1) submitted report to the S.D.M. Kashipur for recording dying declaration.

3. The matter was reported at P.S. Kashipur at 8.30 p.m. on the same day by S.I. D.K.Tiwari (PW 1). The chik F.I.R. is Ex. Ka 1. The crime was registered. The investigation was entrusted to S.S.I. Brijesh Kumar Tyagi (PW 11).

4. Balwant Singh was examined on 16.03.2004 at 8.20 p.m. by Dr. Rakesh Singh (P.W.6) Medical Officer,

L.D.Bhatt Hospital, Kashipur. The following injuries were found on the person of Balwant Singh:

1. A fire arm wound of entry of size 3.5 cm. x 3 cm, depth could not be probed present over the left side back of chest in the lower part, 3.5 cm left lateral to the T11 vertebra, margins irregular inverted and area of abrasion present surrounding the wound, blackening present, bleeding from wound present.
2. An abraded contusion of 1.5 cm x 1.5 cm present over the right side of fore-head, 2.5 cm above the medial end of right eye brown colour of contusion was reddish and oozing of blood was present.
3. Abrasion over the right side cheek of size 2cm x 1.5 cm, 0.5cm below the lateral angle of right eye, bleeding present.
4. An abrasion of 1cm x .5cm present over the bridge of nose, just over the root, bleeding present.

5. In the opinion of the doctor the injuries were fresh in duration. Injuries no. 2, 3 & 4 were simple in nature and caused by fraction of hard blunt object. Injury no. 1 was kept under observation and advised X-ray. The injury report is Ex. Ka 11. Ex. Ka 12 is the report of the Hospital regarding admission of the deceased on 16.03.2004 at 8.20 p.m.

6. Sri Harak Singh Rawat P.W.3 recorded the dying declaration (Ex ka 5) of the deceased Balwant Singh on 16.03.2004 at 8.45 p.m. Balwant Singh died on 16.03.2004 at 10.55 p.m.

7. S.S.I. Brijesh Kumar Tyagi (PW 11) visited the place of occurrence and prepared site plan Ex. Ka 22. The Investigating Officer took in possession blood stained earth and simple earth and prepared recovery memo Ex. Ka 23. S.I. Brijendra Singh (P,W. 8) prepared Panchayat Nama (Ex Ka 17) of the dead body and also prepared Challan lash, Photo lash, which are Ex. Ka 18 to ka 21.

8. Dr. Surendra Singh (PW 2), Medical Officer, L.D. Bhatt Hospital, Kashipur conducted the post mortem on the dead body of Balwant Singh on 17.04.2000 at 4.00 p.m. The postmortem report is Ex. Ka 3. The following ante mortem injuries were found on the dead body of the deceased:

1. Lacerated wound (firearm wound of entry) 4cm x 3.5cm present back of lower portion of left side chest, 3.5cm left lateral to the T11 vertebra, margin irregular, inverted. Blackening and tattooing present. On cutting the wound in chest and abdominal cavity deep.
2. Abraded contusion 4cm x 2cm present below anterior side of right eye.
3. Abraded contusion 3cm x 2cm present right side for forehead.

9. The doctor opined that the cause of death was due to shock and haemorrhage as a result of ante mortem firearm injury.

10. The appellant was arrested on 17.03.2000 at 9.30 p.m. from the Cheti Chauraha by the Investigating Officer S.S.I. Brijesh Kumar Tyagi (PW 11) along with

S.I. D.K.Tiwari (PW 1), Constable Kishan Singh and Constable Vikram Singh and a country made pistol was recovered from his possession and a case under section 25 Arms Act was also registered against the accused.

11. After completing the investigation charge sheet (Ex Ka 24) was submitted against the appellant and Nardev.

12. Charge was framed against the appellant u/s 302 I.P.C. for murdering Balwant Singh and also under section 25 Arms Act. The appellant pleaded not guilty and claimed to be tried. The charge was framed against accused Nardev under section 120 B I.P.C. of conspiracy and the trial court has acquitted him for the said offence.

13. The prosecution in support of its case examined S.I. D.K.Tiwari as PW 1,informant, PW 2 Dr. Surendra Singh conducted the postmortem on the dead body of the decease. P.W. 3 Harkat Singh Rawat, Naib Tehsildar, recorded the dying declaration (Ex Ka 5) of the deceased. P.W. 4 constable Jagdish Prasad proved chik FIR Ex Ka 6 and G.D. entry Ka 7. PW 5 S.I. Shyam Singh investigated the case u/s 25 Arms Act against the appellant. PW 6 Dr. Rakesh Singh proved injury report Ex. Ka 11 to Ex. K 15. P.W 7 Head Constable Ashok Kumar Sharma proved chik F.I.R. Ex ka 1 and G.D. entry Ex. Ka 16. PW 8 S.I. Brijendra Singh proved Panchayat Nama Ex ka 17 and connected papers Ex. ka 18 to Ex. ka 21. PW 9 Nem Chand is the witness of Panchayat Nama. PW 10 Satish Kumar is the witness to prove the factum of conspiracy against Nardev. Nardev has already been acquitted by the trial court and P.W.

11 S.S.I. Brijesh Kumar Tyagi is the Investigation Officer.

14. Before the trial court the defence of the accused was that he has been falsely implicated. The defence of the accused is that of denial. The defence did not prevail and the learned Sessions Judge accepted the prosecution case and convicted the appellant Baboo Ram Jatav for the offence under section 302 I.P.C. and awarded rigorous imprisonment for life. It is, against this verdict that the accused Baboo Ram Jatav comes before us by way of this appeal.

15. It is not disputed that the deceased Balwant Singh had homicidal death on account of injury sustained by him on the date of occurrence. Dr. Surendra Singh P.W. 2 conducted the autopsy on the dead body of the deceased and he has stated in his statement that the death of the deceased was caused due to shock and haemorrhage resulting from ante mortem firearm injury.

16. Now the question for consideration is whether the appellant was responsible for the injury sustained by the deceased, which resulted in his death. The prosecution in its support relied upon the dying declaration of Balwant Singh. There are two dying declarations, one is oral dying declaration given by the deceased to S.I. D.K. Tiwari P.W. 1 at the spot and later on S.I. D.K. Tiwari reduced into writing by way of F.I.R. at the Police Station on the same day. It is stated by S.I. D.K. Tiwari in his evidence that while he was on patrol duty and he reached at Gaushala turn near Pratappur, he found a person lying on the left side of

the road on 16.03.2000 at 7.40 p.m. PW 1 S.I. D.K.Tiwari was coming on the motor cycle and he saw him in the head light of the motor cycle. On enquiry being made, the deceased disclosed his name as Balwant Singh and he stated that his wife had illicit relations with Nardev accused. His wife has left his house. The deceased has left his village and he was residing in Gaushala village, P.S. Kashipur. Nardev has hatched a conspiracy against the deceased and engaged Baboo Ram Jatav appellant to eliminate him. In pursuance to the said conspiracy Baboo Ram Jatav appellant fired on him by a country made pistol. S.I. D.K.Tiwari managed to send him to the Hospital by the truck along with his accompanied constables and Tiwari went to the Police Station where he lodged F.I.R. in which he stated all the details, which were narrated to him by the deceased at the Gaushala turn. He also sent a report to the S.D.M. for recording the dying declaration. Thereafter Dr. Rakesh Singh P.W. 6 examined the deceased at 8.20 p.m. and found that there was one gunshot injury on the person of the deceased, apart from other injuries. He prepared injury report Ex. ka 11. Meanwhile, Naib Tehsildar Harak Singh Rawat PW 3 reached at the Hospital and he recorded the dying declaration of the deceased at 8.40 p.m. Before recording the dying declaration the Naib Tehsildar Harak Singh Rawat P.W. 3 obtained a certificate of Dr. Rakesh Singh to the effect that the deceased was conscious and was able to make the statement to him. He recorded the dying declaration in the of question and answer from. Thereafter, he again

obtained certificate of the doctor that he was conscious while he was given the statement to Harak Singh Rawat, P.W. 3. After recording the statement of Balwant Singh he died at 10.55 p.m. on 16.03.2000. Thus, he has given one oral dying declaration to S.I. D.K. Tiwari PW 1 and another dying declaration was recorded by Harak Singh Rawat Naib Tehsildar P.W. 3 in the hospital on the date of incident in presence of the doctor.

17. At this juncture it is relevant to take note of section 32 of Indian Evidence Act, with deals with the cases in which the statement of relevant fact by a person who is dead or cannot be found, etc., is relevant. The general rule is that all oral evidence must be directs, namely, if it refers to a fact, which could be seen. It must be the evidence of the witness who says that he saw it. If it refers to evidence, which could be heard, it must be the evidence of the witness who says that he heard it. If it relates to a fact, which could be perceived by any other sense, it must be the evidence of witness who says that he perceived it by that sense. Section 32 (1) is the exception to the general rule against hearsay just stated. It is essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are firstly necessity for the victim being generally the only eye witness to the crime, the exclusion of the statement might deflect the ends of justice; secondly the sense of impending death which creates a sanction equal to the obligation of an oath. The general principal

on which this evidence is admitted is that they are declarations made in extremity, when a man is at the point of death and when every hope of this world is gone, when every motive of falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in the court of law. The situation in which a person is on the dead bed is so solemn and serene when he is dying that the grave situation in which he is placed, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. If the dying declaration is excluded it will result in miscarriage of justice because the victim being generally the only eye witness in a serious crime; the exclusion of the statement would leave the court without a scrap of evidence. Such a power is essential for eliciting the truth. This is the reason the court also insists that the dying declaration should be of such nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit condition of mind after a clear opportunity to observe and identify the assailants. Once the court is satisfied that the declaration was voluntary and true, undoubtedly, it can base the conviction without any further corroboration. The rule requiring corroboration is merely rule of

prudence. The Apex court has laid down the principle in several pronouncements that the dying declaration can be the sole basis of the conviction.

18. In the light of the above principle the acceptability of the dying declarations relied by the prosecution has to be considered by us. We will discuss both the dying declarations. The prosecution has placed reliance on the oral dying declaration recorded by S.I. D.K.Tiwari, P.W.1. He has stated in his evidence that while he was on patrol duty along with other constables when he reached near Gaushala turn towards Pratappur about 150 yards at 7.40 p.m., he saw a person in the headlight of motor cycle in an injured condition on the left side of the road from whose back the blood was oozing. On asking his name he disclosed his name as Balwant Singh S/o Seeta Ram R/o District Rampur. He further stated that his wife had illicit relation with Nardev. Nardev has got his wife separated. Nardev has hatched a conspiracy for his murder and engaged Baboo Ram. Due to the fear he left his village and was living in Gaushala village. On the date of occurrence he was coming back from the market of Pratappur after purchasing vegetables. In the way the appellant Baboo Ram met him. The deceased Balwant Singh tried to escape but Baboo Ram filed on the back of the deceased. PW 1 D.K.Tiwari has further stated in his evidence that he sent the deceased to the Civil Hospital, Kashipur through Constables Gauri Sah and Prem Kumar by the truck and he went to the Police Station. He sent a report to the S.D.M. for recording the dying declaration of the deceased. The constables

took the deceased to the hospital. P.W. 1 D.K. Tiwari reached at the police station and lodged a report at 8.30 p.m. on the same day. Thus the report was lodged promptly and he narrated the whole incident what was stated to him by the deceased. Since the deceased has given his statement to D.K. Tiwari P.W.1 Sub-Inspector and subsequently he died in the hospital at Kashipur in spite of treatment given to him on the same day. The statement whatever was given to S.I. D.K. Tiwari by the deceased was recorded in the F.I.R. Thus, it is the substantial piece of evidence.

19. It was submitted by the learned counsel for the defence that the said oral dying declaration is not cogent and credible because S.I. D.K. Tiwari had written the parentage of the deceased as Bhajan Lal in the F.I.R. meaning thereby the deceased informed his parentage to P.W.1. P.W1 had also sent a report (Ex ka 4) to the S.D.M. Kashipur for recording the dying declaration in which he has not written the parentage of the deceased. If he was aware of the parentage of the deceased he would have mentioned it in the report Ex ka 4 submitted to S.D.M. to record the dying declaration. The said dying declaration cannot be relied upon to convict the appellant. The non-mentioning of parentage in Ex ka 4 is not significant because a perusal of Ex ka 4 reveals that the report has been written by some other person and D.K.Tiwari has only signed on it. Looking to the circumstances of the case D.K.Tiwari P.W.1 had sent the deceased to the hospital immediately by arranging the transport. It is obvious that D.K.Tiwari was in hurry to send the deceased to

hospital so that he might get the medical treatment immediately. The submission of the learned counsel for the defence is not tenable.

20. The learned counsel for the defence further contended that S.I. D.K.Tiwari P.W.1 has stated in his evidence that he had not reduced into writing the statement made by the deceased at the place of occurrence. It was not possible for the informant D.K.Tiwari to recollect and remember the incident and the name of the accused. This contention of the learned counsel for the defence is also insignificant because D.K.Tiwari P.W.1 immediately recorded the F.I.R. at the police station. It is obvious that D.K.Tiwari P.W.1 without wasting any further time sent the deceased to the hospital for medical aid. When D.K.Tiwari P.W.1 would have started to reduce the statement in writing at the place of incident, the deceased could not have got the medical aid immediately. P.W.1 had taken due care and precaution so that the life of the deceased could be saved by providing medical assistance at the earliest. We have gone through the evidence of D.K.Tiwari P.W.1. The defence cross-examined D.K.Tiwari P.W.1 at length but there is nothing in his cross-examination, which makes his evidence untrustworthy. Thus, we are of the view that the said oral dying declaration is voluntary and truthful and there is no impediment in relying on the said oral dying declaration.

21. We have gone through the evidence of P.W.1 D.K.Tiwari. There is no enmity of the appellant with P.W.1 D.K.Tiwari and the appellant has not stated in his

statement u/s 313 Cr.P.C. that there was any enmity with S.I. D.K. Tiwari, PW1. There was no suggestion to the prosecution witness as to how the appellant has been falsely implicated by PW1 D.K.Tiwari. Thus there is no reason to falsely implicate the appellant by P.W.1 D.K.Tiwari.

22. The next question, which arises for consideration, is whether this statement is voluntary and truthful. It is not the case of the defence that when the made the statement he was surrounded by any close of his relations/friends who could have prompted him to make an incorrect or false statement. So far as the voluntariness of the dying declaration is concerned there can be no doubt because the deceased was free from any influence or pressure. P.W.1 D.K.Tiwari has stated in his evidence that on enquiry being made to the deceased as to whether anybody was known to him. There he told him that there was none known to him. Thereafter, he sent him to the hospital. Thirdly D.K.Tiwari recorded the version of the deceased in the F.I.R. immediately within a span of 50 minutes at the police station, which was 12 kilomerters from the place of occurrence and he has narrated all the details in the F.I.R. The deceased in his statement to Sri D.K.Tiwari has in clear terms stated that the appellant fired on the back of the deceased from the point blank range and he sustained gunshot injury on his person.

23. The report Ex. ka 4 was sent to the S.D.M. by D.K.Tiwari P.W.1 to record the dying declaration of the deceased Balwant. The S.D.M. directed the Naib Tehsildar Harak Singh Rawat PW3 to record the dying

declaration of the deceased. The said dying declaration was recorded at 8.40 p.m. Earlier to this the injuries on the person of the deceased were examined by Dr. Rakesh Singh at 8.20 p.m. and he found the general condition of the patient as under:

GC-very-very low

PR-not palpable

PR- Gasping

BP-not recordable

Temp.-Extremities cold & clammy

Pallor- xxxx

Dehydration-xxxx

Consciousness-Conscious but restless

Pupils- B/L slightly and reacting to light slugging.

24. Before recording the dying declaration P.W.3 Harak Singh, Naib Tehsildar has obtained the certificate of the doctor Ex ka 13 on the top of the dying declaration who certified that the patient was able to give the statement. As such the doctor has certified that the patient was conscious and was able to make the statement. Thereafter, he recorded the dying declaration, which is as follow:

> **"**1- ejk uke cyoUr g] ejs firk dk uke Hktuyky gA
>
> /kukjh Lokj dk jgus okyk gA
>
> iz'u %1&rEg xkyh fdlus ekjk \
>
> mRrj % ckc iq= lhrkjke us ekjh tks /kukjh Lokj gh jgrk gA
>
> iz u%2& xkyh D;ks ekjh\
>
> mRrj% ejh chch ejs lk<s ujno iq= dsljh ls yxh Fkh] esjs ujno us ejok;k gA

iz u%3& rEgkjh chch dgk jgrh g\

mRrj% ekbd jgrh gA

mld xko d uke&dejhtA

iz u%4& chch dk D;k uke g \

mRrj % Hkokfu;kA“

25. Thus, the Naib Tehsildar P.W.3 had also obtained the certificate of the doctor at the end of the dying declaration after recording the statement of the deceased (Ex ka 14). The doctor had certified that he was fully conscious while he was giving his statement. The prosecution had produced Harak Singh Rawat as PW3, who had proved the dying declaration, in his evidence. He had, in his cross-examination specifically denied that there was any police personnel with him while recording the said dying declaration.

26. It is also not the case of the defence that when the statement was recorded by P.W.3 Harak Singh Rawat the deceased was surrounded by any of his close relations or friends who could have promoted him to make an incorrect or false statement. The evidence of P.W.6 and P.W.3 clearly reveals that he was not surrounded by any person who could have promoted him to make a false statement. So far as, the voluntariness of the statement is concerned there can be no doubt because the deceased was free from external influence or pressure. So far as the truthfulness of the statement is concerned, Dr.Rakesh Singh P.W.6. and Harak Singh Rawat P.W.3 stated that the deceased made the said dying declaration, which was not seriously challenged in their cross-

examinations. The deceased in his brief statement has clearly stated that Baboo Ram S/o Seeta Ram fired upon him. His wife had illicit relations with Nardev who happened to be the brother of his brother-in-law (Sadu).

27. The prosecution also adduced the evidence of Dr. Rakesh Singh P.W.6 who had proved the medical certificate Ex. ka 13 and Ex ka 14 on the dying declaration to the effect that the deceased was conscious while his dying declaration was recorded. It is further to be mentioned here that no enmity of the appellant has been shown in his statement u/s 313 Cr. P.C. or during the cross-examination with Harak Singh Rawat P.W.3 and Dr. Rakesh Singh P.W.6. Both the witnesses are independent persons and there is no motive to them to falsely implicate the appellant. The evidence of Dr. Rakesh Singh P.W.6 clearly reveals that the deceased was conscious and was in fit state of mind to make a statement. That being so, it can be held that the deceased was in a fit condition of mind to make a dying declaration as has been held by the learned trial court. The learned counsel for the defence has submitted that the doctor has recorded the blood pressure not recordable. As such he was not in a fit condition to give the statement to P.W.3 Harak Singh Rawat. Learned G.A. has refuted the contention. Dr. Rakesh Singh P.W.6 has stated in his evidence that the condition of the patient was serious but he was conscious and he was feeling restlessness. Thus, the statement of the doctor clearly reveals that he was in a

position to give the statement. The contention of the learned counsel for the defence is insignificant.

28. The learned counsel for the defence contended that the deceased was examined at 8.20 p.m. and the dying declaration was recorded at 8.40 p.m. He further contended that the report was sent by the doctor to the S.D.M. to record the dying declaration as well as a report was sent by the police to S.D.M. for the same. The S.D.M. deputed Harak Singh Rawat, Naib Tehsildar to record the dying declaration. There was a considerable of S.D.M. and the residence to Naib Tehsildar. The constable first went to the residence of S.D.M. and then to the residence of Naib Tehsildar and then came at the hospital. It was further contended that Naib Tehsildar could not reach within half-an-hour at the hospital. Learned G.A. refuted the contention. P.W.1 D.K.Tiwari has stated in his statement that he sent report Ex.Ka 4 to S.D.M. prior to the arrival of the deceased at the hospital. The doctor also sent a report to the S.D.M. for recording the dying declaration. The contention of the learned counsel for the defence is not tenable because the report was simultaneously submitted to S.D.M. by the police to record the dying declaration when the deceased was sent to the hospital. As such it was possible for Harak Singh Rawat, P.W.3 Naib Tehsildar to reach at the hospital within that time. It was further submitted that the dying declaration contained four questions and in between question no. 3rd and 4th there had a question, which had been written in small letters and it had not

been marked as question number though it should have been numbered as question no.4. A perusal of the evidence of Harak Singh Rawat P.W.3 and P.W.6 Dr. Rakesh Singh reveals that no cross-examination had been made on this point and the said omission on the part of the Naib Tehsildar is insignificant. The whole dying declaration has been written in question and answer form. Needless to emphasis that the dying declarations need not be detained and meticulous form of regular statement. There is no prescribed form of recording the same. The main anxiety of the Court, while assessing the dying declaration is to see that the version that emanates from dying declaration is unprompted, untutored voluntary, rational and reasonable statement of the deceased and relatable to the circumstances, which resulted into final voyage of his life.

29. It was further contended by the learned counsel for the defence that Balwant Singh deceased was taken to the hospital by the constables. While preparing the medical report Ex. Ka14 Dr.Rakesh Singh P.W.6 has mentioned the name and address of the deceased as informed by the accompanied police constables. It was further contended that P.W.6 Dr. Rakesh Singh has also deposed in his evidence that the name and address at the time of admission of the deceased at 8.20 p.m. were given by the accompanied constables. In the present case Dr. Rakesh Singh P.W.6 has deposed that the deceased was in a fit state of mind to make the statement on the date of incident. The evidence of the prosecution witnesses clearly establishes that the

deceased was conscious and he was removed to the hospital through truck by the constables. The appellant has not alleged any enmity against the police or the doctor. The contention of the learned counsel for the appellant is insignificant. No justifiable reason has been pointed out to disbelieve the evidence of the prosecution that the deceased Balwant Singh was not conscious till the time his dying declaration was recorded.

30. We are satisfied from the record that the statement recorded by the Naib Tehsildar Harak Singh Rawat P.W.3, which is in question and answer form is a natural and true version of the deceased, who was mentally fit to make his statement with regard to the incident. PW3 Naib Tehsildar is an independent person against whom no allegation was leveled. From the record, it is found that Naib Tehsildar Harak Singh Rawat P.W.3 started recording the dying declaration of the deceased Balwant Singh after the medical officer incharge put his signature on the certificate that the patient was mentally fit to make the statement. As such the dying declaration recorded by P.W.3 Naib Tehsildar is ture and natural version of the decease.

31. Both the dying declarations further stand corroborated by the evidence of P.W.2 Dr. Surendra Singh who had conducted the autopsy on the dead body of the deceased on 17.3.2000 at 4 p.m. He has stated in his evidence that 21 pellets and one tickli were recovered from his body. The evidence of Dr. Surendra Singh clearly reveals that the fire was made with a very close range and the pellets were found

embedded inside the body. The internal examination of the body also reveals that the fire was made from a close range. Thus the prosecution version as stated in the dying declaration clearly stands corroborated by the medical evidence.

32. Now the question arises for consideration is as to whether the prosecution has been able to prove that the appellant committed the murder by country made pistol. The recovery of the country made pistol and the cartridges had been held unbelievable and he has been acquitted by the learned trial court u/s 25 of the Arms Act. According to the prosecution the country made pistol and empty cartridge were recovered at the time of the arrest of the accused and the country made pistol and empty cartridge were sent to the Ballastic expert, who has opined that it is not revealed that the recovered empty cartridge was fired from that country made pistol. It is obvious that a person who will commit the murder by a country made pistol will never keep that country made pistol with him for such a long time. Thus the country made pistol recovered from the appellant was not of the same country made pistol from which the fire was made on the person of the deceased. Meaning thereby, there is no recovery of the country made pistol, which was alleged to have been used, in the commission of the offence. The Police could not recover the alleged firearm by which the murder was committed.

33. It was contended by the learned counsel of the defence that the clothes of the deceased were sent to the chemical examiner and there is no report on record.

The prosecution has failed to produce the said clothes during the trial, hence an adverse inference may be taken against the prosecution. The learned G.A. has refuted the contention. Failure of non-production of the blood stained clothes and the report thereof by the Serologist only indicates the remissness on the part of the Investigating Officer. The Evidence of the prosecution would not be impaired in any way. In such a situation the lapse on the part of the Investigating Officer should not be taken in favour of the appellant and such lapse is committed because of the negligence of the Investigating Officer. The prosecution evidence is required to be examined de hors such omission to find out whether the said evidence is reliable or not. For this purpose it would be worthwhile to refer the following observations of the Apex Court in the case of **Ram Bihari Yadav Vs. State of Bihar and others, 1998 AIR SCW 1647:-**

> **"**In such cases, the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complaint party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice."

34. After having assessed the entire evidence of the prosecution and considering the relevant proposition of law with regard to dying declaration we are of the clear opinion that both the dying declarations are

trustworthy. It is settled proposition of law that conviction can be based even on the sole dying declaration of the decease, We are satisfied after careful scrutiny of both the dying declarations that these are voluntary, true, unprompted, untutored, cogent, consistent and natural version of the deceased with regard to the incident which resulted into his death. Both the dying declarations are compatible and in accordance with the prosecution case.

35. We are, therefore, completely convinced that the accused Baboo Ram Jatav was rightly convicted by the trial court for the offence of murder. We are, therefore, convinced that the appeal has no merits. The appeal must be dismissed and it is dismissed.

(J.C.S. Rawat, J.) (V.S.Sirpurkar, C.J.)

Dated: 02.09.2004